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HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 879.

PACIFIC INTERMOUNTAIN EXPRESS COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled case on December 23, 1955.

CITATIONS TO OPINIONS BELOW.

The Intermediate Report and Recommended Order of the Trial Examiner and the Decision and Order of the National Labor Relations Board are reported at 110 NLRB 96 and are printed in the record (R. 1382-1433).[1] The Opinion of the Court of Appeals for the Eighth Circuit printed in Appendix B hereto, *infra*, pages A2-A14, is reported in 228 F. 2d 170. The Court of Appeals' denial of Petitioner's Petition for Rehearing is printed in Appendix B hereto, *infra*, pages A15-A16. The Court Decree is printed in Appendix B hereto, *infra*, pages A17-A24.

JURISDICTION.

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 23, 1955, p. A2, *infra*, and rehearing was denied on February 7, 1956.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

(1) Whether the Board may infer that an employer was both hostile to an employee and subservient to a union from the fact that the employer, against the protests of the employee, enforced the seniority provisions (then considered legal by the Board) of a collective contract by referring questions of seniority to the union as required by the agreement, and then ground a finding of discrimi-

[1]Nine additional copies of the portions of the record, which were printed in a Joint Record for the use of the Court below, are included in the record certified to this Court.

nation on such inference when the employee was later discharged.

(2) Whether the requirements of the National Labor Relations Act, as amended, that the record be considered as a whole permit the Board discretionary latitude to refuse to reopen its proceedings for consideration of the record in a State proceeding involving substantially the same issue in which a finding was made contrary to that of the Board.

(3) Whether the Board may disregard a determination reached under the grievance procedure of a collective contract in the absence of any showing of fraud, misrepresentation, or collusion in the grievance process.

(4) Whether a tachograph shown by uncontradicted evidence to be inaccurate in determining the speed of a vehicle at any given point within several thousand feet can, nevertheless, be considered as an "objective test" to substantiate the testimony of an otherwise discredited witness and to override the testimony of all other witnesses otherwise found to be credible when the so-called objectivity attributed to the tachograph rested solely upon the conclusion of the discredited witness.

(5) Whether the Court of Appeals for the Eighth Circuit, while recognizing the rule of the *Universal Camera Company* case, 71 S. Ct. 456, failed to actually apply the rule in its consideration of the record.

STATUTES INVOLVED.

The statutory provisions involved are Sections 8 (a) (1) (3) and (4) and Sections 8 (b) (2) and 8 (b) (1) (A) of the National Labor Relations Act, as amended, hereinafter called the Act, 29 U. S. C., Section 151, *et seq.* They are printed in Appendix A, *infra*, page A1.

STATEMENT OF THE CASE.

The National Labor Relations Board, hereinafter called the Board, pursuant to Section 10(e) of the Act, petitioned the United States Court of Appeals for the Eighth Circuit for enforcement of an order issued by it against Pacific Intermountain Express Company, hereinafter called the Company, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local No. 41, AFL, hereinafter called the Union. The Court of Appeals enforced the Board's order (R. 827).

The facts show that the Company and the Union entered into a collective agreement on February 1, 1952, which provided, *inter alia*, that any controversy regarding seniority should be decided by the Union alone (Co. Ex. 10, Art. V, R. 621-622, R. 1384). Such a seniority clause was at that time regarded as lawful by the Board.[2] The contract also provided for grievance machinery wherein discharges were to be considered at various levels by a joint committee of employer and labor organization representatives (R. 63).

Prior to his discharge, Glenn D. Sanders, Complainant in the Board case, hereinafter referred to as Sanders, was among several employees of the Company who sought to change work assignments on runs or trips from a straight seniority basis to a basis of rotation among employees. Since this involved seniority and was considered by all parties as a matter for exclusive Union determination, Sanders and the others sought to accomplish the change within the Union (R. 568-569). This was dis-

[2]*Matter of Firestone Tire & Rubber Co.*, 93 NLRB 981, 984.

cussed by the membership and several votes on the question were taken but the membership of the Union decided to adhere to assignments by seniority (R. 1384, 1397, 1398).

In the meantime, Sanders and others in his group, referred to by the Board as dissidents, also protested the method of work assignments to the Company. The Company, however, remained neutral, advised Sanders that it had no control over seniority questions, and referred Sanders to the Union as it was required to do under the contract (R. 314, 568-9, 139-40, 142-3, 163-4, 166, 168-9, 172, 314, 355, 568-9, 571, 775, 840, 1019, G. C. Ex. 12, G. C. Ex. 27). The Company did, however, advise the group to which Sanders belonged that it sympathized with their position and expressed the hope that a pending Labor Board case, involving the Company and the Union on the application and possible illegality of the seniority clause in question, would settle the entire issue (R. 172, Co. Ex. 13, Co. Ex. 14). The General Counsel for the Board in the trial of that case also expressed the conviction that, while the Company's action in referring seniority questions to the Union was alleged as an unfair labor practice, it did not involve "personal animus" toward the so-called dissidents (R. 77, 78, 257, 1436).

On January 13, 1953, Sanders, after having been twice previously warned, was discharged for speeding into three towns on a trip from Kansas City to St. Louis (Co. Ex. 34, 836-7, Co. Ex. 14, R. 842, Co. Ex. 35, R. 841). He was observed and clocked by two supervisors of the Company in the normal exercise of their duties in checking Company vehicles and operations on the public highways (R. 812-25, 858-63, 1000-10). The two supervisors who testified in the face of Sanders' denial that he was speeding

were credited by the Trial Examiner on their veracity (R. 1383, 1387, 1396, 1397, 1398).

The discharge occurred the night following the Labor Board proceeding referred to above on the propriety of administering the seniority clause on the basis of the Union's unilateral determination. Sanders had been present as an observer and, during a recess on the final day of that hearing, he and the attorney representing the Union engaged in an acrimonious verbal exchange (R. 1368, R. 191-192) concerning which the Company had no knowledge until after Sanders' discharge. No Company representatives other than the Company's attorney had been present on the final day of that hearing (R. 659, 684, 983-4, 1363).

After Sanders was discharged, Sanders filed an unemployment compensation claim with the State Industrial Commission for the State of Missouri, claiming that he was discharged, not for cause, but for his activities within the Union (2 R. 7, 17-108). The Appeals Tribunal of the Division of Employment Security found that Sanders was discharged for speeding and discredited Sanders as a witness (2 R. 159-162). On appeal, the finding of the Appeals Tribunal was upheld by the full Industrial Commission for the State of Missouri (2 R. 169). On further appeal and after the Board had already rendered its decision in the instant matter, the Circuit Court of Jackson County, Missouri, upheld the Industrial Commission and made a finding of fact that the decision was "supported by competent and substantial evidence" (R. 1447-9). The Board was requested to consider the Court's decision by motion duly filed (R. 1442-5), but the Board denied the motion on the grounds that the "proffered evidence would not require a different disposition" (R. 1450-1).

Sanders also protested his discharge under the contract between the Company and the Union and his case was processed through the regular grievance procedure. The joint panel upheld the Company's action by a vote of 4 to 2 (Co. Ex. 21, R. 641-8, 705; Co. Exs. 3, 4, 11, 12).

The Trial Examiner also dismissed the complaint. He found "not a single iota of evidence in the record" supporting the complaint against the Company (R. 1398, 1400); that to hold otherwise would be "pure speculation" (R. 1399) and that there was "no evidence" that the Union caused or attempted to cause Sanders' discharge (R. 1390).

The Board, however, reversed. Its reversal was based on a finding that the Company's "indifference" to Sanders' "legitimate complaints" on the seniority clause (which at that time had been held to be legal by the Board) evidenced (1) "hostility toward the dissidents' activities" and (2) "a predilection to act with respect to such employees in harmony with the Union's suggestions or desires" (R. 1418). It stated that the Company should have been "provoked" "into some action on behalf of the dissidents" (R. 1413).

Aside from the bare enforcement of the contract clause, there was no independent evidence, direct or circumstantial, beyond the proven discredited testimony of Sanders, of "hostility" to Sanders or "subservience" to the Union; nor was there any evidence, direct or circumstantial, that the Union had caused, or had sought to cause, Sanders' discharge. As support for its conclusion, however, the Board relied heavily on the acrimony of the verbal exchange between Sanders and the Union's attorney and the fact that the discharge occurred shortly after the exchange took place (R. 1419-20). The Board also noted that Sanders had once engaged in a fight with one

Clevenger, an assistant business agent for the Union (R. 1418).

As to the Company's reason for discharging Sanders, that is, speeding into three separate towns on the highway between Kansas City and St. Louis, the Board asserted that a tachograph demonstrated that Sanders was not speeding at the particular places in question (R. 1421-2). While the tachograph, by uncontradicted evidence in the record, was admittedly inconclusive in determining the rate of speed at any given point, the Board nevertheless relied upon it as an "objective test" to reverse all of the Trial Examiner's credibility findings and to verify Sanders' denial of the speeding charge. All witnesses had testified as to the undependability of the tachograph, including Sanders on cross-examination. The so-called "objectivity" on which the Board relied depended solely on Sanders' testimony that it was proof of his denial (R. 323, 539, 805, 864, 955, 1015-6).

REASONS FOR GRANTING THE WRIT.

1. The enforcement of the seniority provision in the contract between the Company and the Union (which was a master contract covering many locals and many different employers (R. 621-622)) whereby the Union alone was to decide all issues relating to seniority, including the operation of runs, had, at the time of the events in question, received the sanction of the Board, for, in the *Firestone Tire & Rubber Company* case, 93 NLRB 981, 984, the Board found a substantially identical provision to be legal. While the Board in a later decision found that such a clause violated the provisions of the Act, this was not until after the events in question had already occurred, *Carlos Beall et al.* v. *Pacific Intermountain Express and Teamsters Local 41,*

107 NLRB 837. Yet, upon the basis of the Company's enforcement of this contractual provision, the Board inferred from that fact and that fact alone that the Company was *hostile* to Sanders and *subservient* to the Union (R. 1418). Where both reason and law dictated the propriety and need of Company neutrality, the Company was held liable by the Board and the Court below for its "indifference" in the internal Union controversy over seniority and its failure to take some affirmative "action on behalf of the dissidents" (R. 1413).[3] This inference was the keystone of the Board's entire case. If improperly inferred, the entire case must fall. A finding that a company may be held liable for doing an act which, when done, was considered as lawful, is contrary to all principles of law. Indeed, the Court of Appeals for the Eighth Circuit itself stated:

> "When the practical purposes of the Act and the commanding control of the Board in their effectuation are considered, it does not seem to us to make either legal or common sense to say that the Board's rulings are wholly without any sanctity under the Act as a guide for employer or union conduct, but that the Act intends that anyone who relies upon and uses the Board's rulings as a basis for his actions shall be left subject to entrapment and branding as the perpetrator of an unfair labor practice in what he has thus done, if the Board thereafter chances, by reason of change in personnel or otherwise, to depart from one of its previous positions and rulings" (*National Labor Rel. Bd.* v. *International Brotherhood*, 225 F. 2d 343, at 348).

We submit that this unwarranted finding of liability is such an obvious and exceptional showing of error that the decision of the Board, confirmed by the court below, must be reversed.

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[3]Indeed, if the Company had taken sides in the controversy, it would have been liable under the Act, irrespective of motive, *Radio Officers Union* v. *NLRB*, 347 U. S. 17, 74 S. Ct. 323.

2. In the State proceedings, the issue was whether Sanders was discharged for cause. While it is recognized that matters pertaining to unfair labor practices are subject to the jurisdiction of the Board, nevertheless, in the State proceedings, Sanders, as a defense, alleged that he was discharged not for speeding but rather for his activities within the Union on the seniority issue. Thus, this issue was fully explored and decided adversely to Sanders. The tribunal there found that Sanders was discharged for speeding as alleged by the Company and discredited Sanders as a witness. The record in the State proceedings was made a part of the Board record. These findings were ultimately upheld by the Circuit Court of Jackson County after the Board had rendered its decision. The Company moved to reopen the record before the Labor Board to introduce the Court's judgment but the Board refused.

It has been held to be error for the Trial Examiner not to permit cross-examination upon the basis of the record of a State Mediation Board Meeting, *Daily Review Corp.* v. *NLRB*, 192 F. 2d 269. The Board itself has considered the probative value of the transcript of State Court proceedings, *Nashville Corporation*, 94 NLRB 1567. We submit that to now hold otherwise is an abuse of discretion. The Sixth Circuit had occasion to consider it in *United Brick & Clay Workers* v. *Deena Artware*, 198 F. 2d 637, 642, but the Eighth Circuit Court of Appeals indicated it would take a contrary position, *NLRB* v. *Injection Molding Company*, 211 F. 2d 59, 65. To our knowledge, the extent to which the Board must consider other legal proceedings in making a determination on the merits has never before been considered by this Honorable Court. This is a question of importance not only in the administration of the Act but of other administrative bodies, and this question, we submit, should now be reviewed.

3. Sanders initiated the procedure under the collective contract to have his discharge heard on the merits by a joint management-labor grievance committee. The discharge was upheld. In labor-management relations today, there is a growing need for the peaceful settlement of disputes. Indeed, it is the policy of the Act (Section 1(b)) "to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other * * *." The courts and the Board itself have frequently taken cognizance of arbitration awards in their own determinations, *Hohman's Cleaners*, 37 LRRM 1408; *Administrative Ruling of NLRB, General Counsel*, Case No. K-270, 37 LRRM 1416; *Timken Roller Bearing Co.*, 70 NLRB 500; *Paramount Pictures, Inc.*, 70 NLRB 557; *Administrative Ruling of NLRB, General Counsel*, Case No. 724, 1953; *Spielberg Mfg. Co.*, 112 NLRB 1080. The contract between the Company and the Union provided an impartial means of disposing of the numerous grievances arising thereunder. We submit that, where there is no showing of fraud, misrepresentation, or collusion, the award of such a body must be considered as part of the record considered as a whole.

4. The record is conclusive that the tachograph relied on both by the Board and the Court as an "objective test" to determine the credibility of witnesses was in fact inconclusive and was not a so-called "objective test." The Court below stated that "the exact point where a speed zone starts could not be pinpointed within several thousand feet on the tachograph chart and such contention has considerable support" (p. A6, *infra*). The Board ignored the inexactness and then, assuming that the distance on the tachograph was approximately coextensive with the speed zones of the towns in quesiton, overlooked the fact that

Sanders may well have been speeding into the prohibited zones, as creditable witnesses testified, but did not accelerate the speed immediately upon leaving the outskirts of the towns. Thus, the tachograph could not provide an "objective test"; rather, its so-called objectivity rested solely upon the testimony of Sanders, a witness thoroughly discredited not only by his own testimony but by documentary evidence and by every tribunal who heard and saw him testify.[4]

The Court below stated that the Board followed a proper legal standard and reached a permissible conclusion in reversing the credibility findings on the grounds that "in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next," citing *NLRB* v. *Pittsburgh Steamship Co.*, 337 U. S. 656, 659. The Court's holding, we submit, demonstrates an erosion of the legal principle announced by this Court; for the record shows, all of which the Court overlooked, that not only was the tachograph not an "objective" test, but that it was Sanders who was discredited by objective evidence of conclusive nature and by patently inconsistent and false testimony: For example, documentary evidence disproving Sanders' testimony on his charge that the Company sought to transfer him to another terminal (R. 1426-1428, G. C. Ex. 15, G. C. Ex. 16, R. 664, 682-683, 940, 941, 976, 986-989); documentary evidence disproving Sanders' testimony on his time of departure from Kansas City (R. 67, 194, 317, 319, 744-755); documentary proof disproving his testimony that he knew nothing concerning the processing of his grievance

[4]The Trial Examiner observed and discredited Sanders and found Baker and Lohrey, who observed him speeding, to be honest witnesses (R. 1387, 1383, 1390, 1396, 1397, 1398). The Appeals Tribunal likewise discredited Sanders (2 R. 32-35, 2 R. 100, 102).

(U. Ex. 3); and other patently evasive and false testimony on other material issues, such as his testimony concerning the rule against exceeding posted speed zones (R. 326-336, 2 R. 33-36); his testimony concerning the grievance procedure (R. 293 to 300, 442, 444-446). The rule of this Court in the *Pittsburgh Steamship Company* case was, we submit, applied to the wrong witness.

5. We submit that the rule of this Court in the *Universal Camera Company* case was completely ignored and that the substantial evidence to the contrary militating against the Board's finding was disregarded. From the mere fact that Sanders was discharged, the Board inferred a discriminatory discharge made at the request of the Union solely because the Company had enforced the contract provision regarding seniority and because Sanders was one of a group of dissidents opposing Union action. This, we submit, is not substantial evidence. The Court permitted the Board's findings and conclusions to stand, overlooking, as did the Board, the evidence to the contrary. Thus, where the Board found a discriminatory motive in a finding that the Company sought to transfer Sanders, the Board and the Court disregarded the demonstrated fact that it was Sanders himself who sought the transfer; where the Board asserted that the tachograph chart supported Sanders' testimony, it disregarded the fact that the tachograph chart was not an objective test but that the so-called objectivity depended on the conclusion of Sanders alone. Where the Board found that the Company was hostile to Sanders and subservient to the Union (R. 1413, 1418), the Court disregarded the fact that this key inference of discrimination was not only unfairly drawn from the mere fact that the contract was enforced as required, but that it was also directly contrary to other affirmative evidence in the record, including an admission by the General Counsel,

that the Company was neither hostile to Sanders nor subservient to the Union (R. 655, 660, 726, 172, 77, 78, 257, 1436, Co. Ex. 13, Co. Ex. 14). From the mere fact that there was an internal Union dispute and disagreement between Sanders and Union representatives—and no more evidence than that—the Board found *proof* that there was discrimination when a discharge occurred. The above, we submit, demonstrates a flouting of the rule in the *Universal Camera Company* case.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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April 17, 1956.

APPENDIX A.

LABOR MANAGEMENT RELATIONS ACT, 1947

AS AMENDED OCTOBER 22, 1951

* * *

"UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * *

"(b) It shall be an *unfair labor practice for a labor organization or its agents*—

"(1) *to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7:*

* * *

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 15,318.

National Labor Relations Board, Petitioner,

vs.

Pacific Intermountain Express Company, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-The-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL,

Respondents.

Petition to Enforce Order of the National Labor Relations Board.

[December 23, 1955.]

Rose Mary Filipowicz, Attorney, National Labor Relations Board (Theophil C. Kammholz, General Counsel; David P. Findling, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel; and Frederick U. Reel, Attorney, National Labor Relations Board, were with her on the brief), for Petitioner.

Harry L. Browne (Raymond F. Beagle, Jr., and Spencer, Fane, Britt & Browne were with him on the brief), for Respondent Pacific Intermountain Express Company.

John J. Manning for Respondent International Brotherhood of Teamsters, etc., Local No. 41, AFL.

Before JOHNSEN, COLLET, and VAN OOSTERHOUT, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

The National Labor Relations Board, hereinafter called Board, pursuant to section 10(e), of the National Labor Relations Act, as amended (29 U.S.C., § 151 et seq.), hereinafter called the Act, has petitioned this court for enforcement of an order (reported at 110 NLRB No. 14) issued by it against Pacific Intermountain Express Company, hereinafter called Company, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-The-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL, hereinafter called Union. The Company because of alleged violations of its speed and safety regulations had discharged its employee Sanders, and had issued a warning letter to its employee Dunbar. The Board found that no safety regulation had been violated, and that in the action taken against Sanders and Dunbar the Company had violated section 8(a) (1), (3), and (4) of the Act, and that the Union had violated section 8(b) (2) and 8(b) (1) (A) of the Act. The Company and the Union were ordered to cease and desist from the unfair labor practices of which they were found guilty and to make Sanders whole for loss of earnings caused by his discharge. The Company was required to reinstate Sanders and to withdraw the warning letter issued to Dunbar. The Union was directed to notify Sanders and the Company that it had no objection to Sanders' reinstatement, and both Company and Union were required to post appropriate notices.

The Company is a motor freight carrier engaged in interstate commerce. Its general offices are located in Oakland, California, with terminals in various States includ-

ing one in Kansas City, Missouri. The present difficulty arose in the Kansas City, Missouri, district.

The principal question for determination is whether the Board's findings are supported by substantial evidence on the record as a whole, and the subsidiary question is whether the Board's reversal of certain credibility findings of the trial examiner was warranted.

The law applicable to this case appears to be well established. The scope of review of the decisions of the Board is thoroughly discussed and explained in *Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474. Upon review we are required to give consideration to the special qualifications of the Board to deal with problems in its field. A reviewing court can not try the case de novo and substitute its judgment for that of the Board. The court is justified in setting aside the Board's decision when it can not conscientiously find that the evidence supporting the Board's decision is substantial when viewed in the light of the record in its entirety including the evidence opposed to the Board's view. The *Universal Camera* case also charts the course for the courts to follow when the Board disagrees with its trial examiner who has heard the evidence. The Court at page 492 states:

> "* * * The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are 'clearly erroneous.' Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required."

And at page 496:

> "* * * The 'substantial evidence' standard is not modified in any way when the Board and its exami-

ner disagree. * * * The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. * * *"

See also *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 359, 364. The Board's decision may be based upon circumstantial evidence as well as direct evidence. Direct evidence of a purpose to violate a statute is rarely obtainable. *N.L.R.B.* v. *International Union, etc., Local 101*, 8 Cir., 216 F. 2d 161, 164; *Hartsell Mills Co.* v. *N.L.R.B.*, 4 Cir., 111 F. 2d 291, 293; *N.L.R.B.* v. *Thomason Plywood Corp.*, 4 Cir., 222 F. 2d 364.

The evidence in this case was taken before a trial examiner who filed his report with the recommendation that the complaint be dismissed as to both Company and Union. Violation of the Company's rule requiring drivers to observe posted speed regulations was the basis for Sanders' discharge. Sanders had received a warning letter in November 1952, stating that he had exceeded the speed limit in High Hill, Missouri, at 1:30 A.M. on October 31, 1952. Baker, the Company's driver supervisor, and Lohrey, its driver foreman, claim that they personally observed Sanders violate posted speed regulations in three small communities on the night of January 12 and the early morning of January 13, 1953. Sanders denied that he was speeding on any of these occasions and produced evidence to support his contention. In the contract between the Company and the Union the circumstances under which an employee could be discharged are set out, and a driver could not be discharged for violating speed regulations unless a warning letter had been given to the employee for the same offense within the preceding nine months. The examiner found that the evidence did not establish that Sanders and Dunbar violated the Company's speed and safety regulations. Sanders' truck was equipped by

the Company with a tachograph. The examiner concluded that the tachograph charts "tipped the scales in favor of Sanders on the speeding issue." There is considerable conflicting evidence in the record on the speeding issue. The respondents contended that the exact point where a speed zone starts could not be pinpointed within several thousand feet on the tachograph chart, and such contention has considerable support. However, the examiner relied upon the fact that the chart at the approximate location of the speed regulation zones in controversy indicated a slowdown for the distance required to pass through such zones. Inasmuch as both the examiner and the Board agreed that neither Sanders nor Dunbar violated any speed laws on January 12 and 13, 1953, and there is ample evidence to support such a finding, we deem it unnecessary to discuss in further detail the extensive evidence relative to the claimed speed violations.

Some question is raised as to the admissibility of the tachograph charts in evidence. The tachographs were installed and maintained by the Company. The drivers were required to turn in the tachographs charts. Under such circumstances the charts were admissible as business records under 28 U.S.C., § 1732. The weight to be given the charts was for the determination of the fact-finding body.

The Board was warranted in finding that Baker and Lohrey knew there was no foundation for the charges of speed violations by Sanders and Dunbar. Consequently, it is apparent that the disciplinary action taken against the said employees was for reasons other than speeding.

The complaint here involved is summarized by the Board in its opinion as follows:

> "Stated in broad terms, the theory upon which this complaint was primarily litigated was that the

Company discharged Sanders and threatened to discharge Dunbar, following the exertion of Union pressures on sympathetic Company officials, because these two employees played a prominent role in a 'dissident' employee movement which the Union found objectionable. This dissident movement was directed toward obtaining, through clearly protected activities which included the invocation of Board procedures, a change in the administration of certain contractual 'seniority' provisions having an adverse effect on the work assignments of the dissidents.[1] As an additional complementary theory, the General Counsel also set out to establish the Company's independent *animus* against Sanders and others of the dissident employee group. This theory has as its basis the argument that the dissidents' activities sought to disrupt the harmonious relations between the Company and the Union, and had included action involving the Respondents in a Board complaint proceeding seeking to impose upon them back pay and other financial liabilities."

The examiner and the Board are in agreement on findings thus summarized by the Board:

"(a) Sanders' prominent leadership of the dissident employee movement; (b) Sanders' prominent role in the invocation of both intra-union rights of appeal to the Union's International body and of Board procedures, as a means of obtaining a favorable resolution of the 'seniority' and other disputes of interest to the dissidents; (c) the openly and sometimes violently expressed animosity of the Union leaders towards Sanders because of the nature and extent of his activi-

[1]The Board used the word "dissidents" to refer to a group of Company employees belonging to the Union who objected to the assigning of work on the basis of seniority predicated on the date of acquisition of Union membership, the seniority determination being made by the Union. We shall also so use the term "dissidents."

ties; and (d) the Company's knowledge of the basis of the dissidents' dispute with the Union, and of Sanders' prominent role in the dissident movement. He found also that although the Company sought to justify Sanders' discharge on the basis of his alleged violation of posted speed limits while operating a Company truck, the evidence did not tend to establish the factual validity of the speed violations charged to Sanders."

The examiner, however, found that evidence was lacking to show that the Union asserted pressure on the Company to effect Sanders' removal, or that the Company was concerned in or affected by the dissident movement or was otherwise interested in resolving the dispute between Sanders and the Union in favor of the latter. Sanders had testified as to various conversations with Company officials to the effect that he was urged by such officials to discontinue the dissident movement, that he was urged to transfer, and that he was told that the Company was under Union pressure to discharge him. The examiner discredited Sanders' testimony as to his conversations with the Company officials. In most of such discussions the Company was represented by Baker and Lohrey. These are the two officials who claimed to have caught Sanders and Dunbar violating speed regulations and whose testimony on the speeding charges was discredited by the examiner. The Board in its opinion expresses reluctance to reverse the trial examiner's credibility findings, carefully reviews the relevant evidence, and concludes:

"Upon the clear preponderance of all the relevant evidence including the fact that, on the one occasion provided by the record where the truth or falsity of conflicts between material portions of Baker's and Lohrey's testimony and those of Sanders could be objectively tested, the former were proven false, we are persuaded that the Trial Examiner's

resolution of credibility was incorrect and that Sanders' versions of his statements between himself and Company agents on the subject of transferring were more believable, and should be credited."

In *N.L.R.B.* v. *Pittsburgh Steamship Co.*, 337 U.S. 656, at p. 659, the Supreme Court states:

> "* * * Thus, in the determination of litigated facts, the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next. * * *"

We believe that the Board in reversing the credibility findings of the trial examiner followed proper legal standards and reached a permissible conclusion.

The Board in its opinion also states that even if the examiner's credibility findings were adopted there is sufficient evidence to support its findings and decision. The facts upon which the Board bases the foregoing conclusion are fully discussed in the Board's published opinion. The printed record here consists of 829 pages and contains evidence supporting the contention of each of the parties. A detailed discussion of all of the conflicting evidence would unduly prolong this opinion without accomplishing any useful purpose. The record clearly discloses that Sanders and his associates were dissatisfied when the Company changed the extra board driving from a rotation basis to a seniority basis. The dissidents complained particularly because the seniority was determined by the Union and upon the basis of length of Union membership rather than length of employment with the Company. Various protests were made to local and national officials of the Company and to local and international officials of the Union. Various Company officials and representatives of the International Union came to Kansas City to investigate the complaints. The Company took the position that the sen-

iority problem was a Union problem, and took no steps to meet the complaints. Some of the dissidents notified the Company that it would be held responsible for damages caused by violations of certain employees' seniority rights. The record supports a finding that both the Company and the Union officials were considerably annoyed and disturbed by the dissidents' persistent claims. Ultimately, at the instigation of the dissidents, proceedings were instituted before the Board which resulted in the finding that there had been seniority discriminations against certain employees. Upon petition for enforcement, *N.L.R.B.* v. *International Brotherhood of Teamsters, etc.*, 8 Cir., 225 F.2d 343, enforcement of the Board's order was granted as to the employees discriminated against, this court saying (p. 349):

> "* * * we are allowing the union to be prohibited here from performing or giving effect in any way to the contract provision in the particular situation, not because of its having made the contract provision, but because of the abuse to which it has seen fit to put the provision in the specific situation. This abuse has been such that we think the Board could properly have left the union where it would not be able to make any further possible use of the provision in the particular employment situation, even if the provision itself had been generally valid."

Enforcement in the proceedings last referred to was not asked against the Company as the Company satisfied the Board that it was willing to comply with the Board's order.

At a recess on the final day of the hearing before the examiner on the dissidents' complaint, Langsdale, who had been an attorney for the Union for 40 years and who was appearing for the Union, found fault with Mrs. Fassig,

the General Counsel attorney, because she had conferred with Sanders. The Board found that Mrs. Fassig stated that Sanders had every right to be present as he was an "employee and a member of the Union," to which Langsdale replied, "He may be now, but how long will he be." Contrary to the examiner, the Board found the Union was chargeable with the remarks of its counsel as Langsdale in making the remarks was speaking in the role of attorney for the Union, and that the remarks were consistent with and expressive of the Union's previously displayed animosity to Sanders. Both the Company and the Union contend that the remarks made by the attorney were beyond the scope of his authority. It is no doubt true that Langsdale had no authority as attorney for the Union to make any discharges. However, he had been attorney for the Union for many years, and the remarks were made while he was engaged in representing the Union in litigation in which Sanders was interested.

We believe that it was a fact question for the Board as to whether a statement attributed to the attorney reflected the Union's attitude toward Sanders. The Company's attorney was present when Langsdale made the above statement. While immediate knowledge of this incident is disclaimed by the Company, it is not unreasonable for the Board to conclude that the incident was promptly brought to the attention of the Company. At 7 P.M. that very night Baker and Lohrey started their trip to St. Louis, and on the basis of speed violations which they claim they detected on that trip, immediately on arrival in St. Louis they discharged Sanders and warned Dunbar. The Company produced some records to indicate other drivers had been discharged for violations of speed regulations at other terminals of the Company. Baker testified that no such discharges had been previously

made at Kansas City. Schaefer, director of employee relations at the Company's home office, testified that the disposition of speed violations was up to the discretion of the driver supervisor. Warning and discharge letters were not automatic. Even in the case of conviction of drivers for more serious traffic offenses, the drivers' general history and record and all pertinent facts would be considered in determining the action to be taken. Schaefer further testified:

> "Q. Now, you mentioned in cross-examination by Mr. Manning that you don't discharge anyone unless you can make it stick. Would you explain what you mean by that.
>
> "A. Well, getting along with these Unions on those matters is not very easy. And the contract is quite explicit. There's a long history of cases, that's why I attend these hearings, and unless we know that under the contract and under the interpretations placed on the contract, by the state boards and by the joint area board, which can give us at least a certain amount of assurance that we won't be forced to take the employee back, we would probably try to find some lesser means of discipline."

It is also of some significance that the disciplinary action against Sanders and Dunbar was taken immediately after the arrival in St. Louis about 4 A. M. This gave the supervisor little opportunity to follow the usual practice of reviewing the driver's record and history. The Union's treatment of Sanders was also quite unusual. While Sanders was protesting the Union seniority determinations at the local Union headquarters, he was severely beaten by Clevenger, assistant business agent of the Union, to the extent that hospitalization was required. Clevenger was indicted for assault and pleaded guilty and paid a fine of $100. Clevenger usually represented members of the

local union at grievance hearings, both at the local level and the appeal level, although at other times other officers served in such capacity. Clevenger represented Sanders at the grievance hearing at the local level and at the hearing before the Missouri-Kansas Highway Drivers Council, a joint company union appeal board. There is evidence that Sanders had protested against having Clevenger represent him, and that he had supplied the Company with information as to sources of evidence. The record justifies the finding that the Union did not protect Sanders' rights with its usual vigor. This ties in to some extent with Schaefer's testimony that employees were ordinarily not discharged for traffic violations unless the Company felt that it could make the discharge stick.

We believe that there is substantial evidence when viewed in the light of the record in its entirety to support the findings and decision of the Board.

Finally, the Company urges that the Board erred in failing to reconsider its decision and to reopen the record to show that a contrary result was arrived at in the State Employment Compensation proceedings. Before the present case was submitted to the Board, Sanders had applied for and been denied unemployment compensation for a period of three weeks by the Industrial Commission of Missouri, the decision being based upon the finding that Sanders was discharged for cause. Sanders appealed to the Circuit Court of Jackson County, Missouri, which court on December 15, 1954, subsequent to the decision herein by the Board affirmed the decision of the Commission. The Board denied the Company's request to reopen the proceedings by written order, setting out its reasons for so doing. An application for leave to adduce additional evidence is ordinarily addressed to the sound discretion of the court. *Southport Petroleum Co.* v. *N.L.R.B.*,

315 U.S. 100, 104. Each fact-finding agency is entitled to make its own decision upon the evidence before it, and the fact that another tribunal has reached a different conclusion upon the same issue arising out of the same transaction does not invalidate any decision which has proper evidentiary support, *United Brick & Clay Workers* v. *Deena Artware*, 6 Cir., 198 F. 2d 637, 642.

A careful review of the record leads us to the conclusion that the Board did not abuse its discretion in refusing to reopen the proceedings.

The order of the Board will be enforced.

COLLET, Circuit Judge, participated in the determination of the result reached in this case but died before the formal adoption of the Court's opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Before Judges Johnsen and Van Oosterhout)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 15,318 September Term, 1955

National Labor Relations Board,
Petitioner,

vs.

Pacific Intermountain Express Company, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL.

On Petition for Enforcement of an Order of the National Labor Relations Board.

Petition for rehearing filed by the Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfers Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL, has been considered and it is by the Court hereby denied.

Petition of the Respondent, Intermountain Express Company, for a rehearing with motion for an *en banc* consideration was also filed and on January 26, 1956, the Court *en banc* denied consideration of the merits of the petition for rehearing and referred said petition for rehearing, together with motion for an *en banc* consideration, to this Division of the Court consisting of Circuit Judges Johnsen and Van Oosterhout, by which decision

was rendered in the case, for the making of such determination thereof and the entering of such order thereon as it deems called for in the situation.

After due consideration by said Division of the Court, it is Ordered that the motion of the Intermountain Express Company for an *en banc* consideration of its petition for rehearing and the petition for rehearing are each hereby denied.

February 7, 1956.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

National Labor Relations Board, Petitioner, vs. Pacific Intermountain Express Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL, Respondents.	No. 15318

Decree Enforcing an Order of the National Labor Relations Board.

Before: Johnsen, Collet, and Van Oosterhout

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated September 30, 1954. The Court heard argument of respective counsel on September 20, 1955, and has considered the briefs and the transcript of record filed in this cause. On December 23, 1955, the Court being fully advised in the premises, handed down its decision enforcing the order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that

1. The Respondent, Pacific Intermountain Express Company (hereinafter called Respondent Company) its officers, agents, successors and assigns, shall:

(a) Cease and desist from:

(1) Discouraging its employees from invoking Board processes or from encouraging membership in the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL (herein called Respondent Union), or in any other labor organization of its employees, by discharging or threatening to discharge them or by discriminating against them in any other manner in regard to their hire or tenure of employment or any term or condition of their employment, except to the extent permitted by Section 8 (a) (3) of the National Labor Relations Act (hereinafter called the Act);

(2) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

(b) Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(1) Offer Glenn D. Sanders immediate and full reinstatement to his former or to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(2) Remove from its official personnel records all copies of the warning letter issued by it on January 14, 1953, to Paul Dunbar.

(3) Upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to an analysis of the amount of back pay due in accordance with this Decree;

(c) Post at its terminal in Kansas City, Missouri, copies of the notice attached marked "Appendix A." Copies of the notice, to be furnished by the Regional Director of the Seventeenth Region of the National Labor Relations Board, Kansas City, Missouri, as the agent of the Board, shall be posted by the Respondent Company immediately upon their receipt, after being duly signed by an official representative of the Company. When posted, they shall remain posted for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Company to insure that these notices are not altered, defaced, or covered by any other material.

(1) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree what steps it has taken to comply herewith.

2. The Respondent, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL, its officers, representatives, agents, successors and assigns, shall:

(a) Cease and desist from:

(1) Causing or attempting to cause the Respondent Company, its officers, agents, successors, or assigns, to discriminate against employees in violation of Section 8 (a) (3) of the Act;

(2) In any other manner restraining or coercing employees of the Respondent Company in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

(b) Take the following affirmative action which the Board has found will effectuate the policies of the Act.

(1) Notify Glenn D. Sanders and the Company immediately in writing, that it has no objection to Sanders' reinstatement without prejudice to his seniority or other rights and privileges.

(2) Post at its business offices and meeting halls in Kansas City, Missouri, copies of the notice attached marked Appendix B. Copies of the notice, to be furnished by the aforesaid Regional Director as the agent of the Board, shall be posted by the Respondent Union immediately upon their receipt, after being duly signed by an official representative of the Union. When posted, they shall be maintained by it for a period of sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Union to insure that these notices are not altered, defaced, or covered by any other material;

(3) Mail signed copies of the notice attached to this Decree marked "Appendix B" to said Regional Director, for posting, the Respondent Company willing, at the office and places of business of the Respondent Company, in the places where notices to employees are customarily posted. Copies of the notice to be furnished by the aforementioned Regional Director as the agent of the Board, shall be returned forthwith to the Regional Director after they have been signed by an official representative of the Union, for such posting.

(4) Notify said Regional Director in writing, within ten (10) days from the date of this Decree, what steps it has taken to comply herewith.

(5) The Respondents, Pacific Intermountain Express Company, its officers, agents, successors, and assigns, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen Local No. 41, AFL, its officers, agents, successors, and assigns, shall jointly and severally, and in the manner set forth in that section of the National Labor Relations Board's Decision and Order, dated September 30, 1954, entitled "The Remedy," make whole Glenn D. Sanders for any loss of pay he may have suffered because of the discrimination against him.

Dated:

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

a Decree of the United States Court of Appeals, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage our employees from invoking Board processes, or encourage membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen Local No. 41, AFL, or in any other labor organization of our employees or by discharging or threatening to discharge all of them or discriminating against them in any other manner in regard to their

hire or tenure of employment or any term or condition of their employment, except to the extent permitted by Section 8 (a) (3) of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

WE WILL make Glenn D. Sanders whole for any loss of pay he may have suffered by reason of the discrimination practices against him, and will remove from our official personnel records, relating to Paul Dunbar, all copies of the warning letter issued to him January 14, 1953.

All our employees are free to become, remain, or to refrain from becoming or remaining members of the above-named Union or any other labor organization, except to the extent that this right may be affected by an agreement authorized by Section 8 (a) (3) of the Act.

Pacific Intermountain Express Company,
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date of posting, and must not be altered, defaced, or covered by any other material.

APPENDIX B

NOTICE

TO ALL MEMBERS OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, OVER-THE-ROAD AND CITY TRANSFER DRIVERS, HELPERS, DOCKMEN & WAREHOUSEMEN, LOCAL No. 41, AFL

PURSUANT TO

a Decree of the United States Court of Appeals, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT cause or attempt to cause Pacific Intermountain Express Company, its officers, agents, successors or assigns, to discriminate against its employees within the meaning of Section 8 (a) (3) of the Act.

WE WILL NOT in any other manner restrain or coerce employees of the above Company, its successors or assigns, in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act, as amended.

WE WILL make Glenn D. Sanders whole for any loss of pay suffered because of the discrimination practiced against him.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen & Warehousemen, Local No. 41, AFL (Labor Organization)

Dated ..... By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 879

PACIFIC INTERMOUNTAIN EXPRESS COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. A2-A-14)[1] is reported at 228 F. 2d 170. The findings of fact, conclusions of law, and order of the Board (R. 1409-1434) are reported at 110 NLRB 96.

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[1] As in the petition, the symbol "R." refers to the numbers appearing in bold face type on separate lines in the joint printed record below. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References to the Board General Counsel's, the petitioning company's, and the Union's exhibits printed in the joint record are designated "G.C. Ex.," "Co. Ex.," and "U. Ex.," respectively.

JURISDICTION

The decision of the court below was issued on December 23, 1955. Petitioner's application for rehearing and motion for an *en banc* consideration of the application were denied on February 7, 1956 (Pet. A15-A-16). The decree of the court below was entered on February 8, 1956 (Pet. A17-A24). The petition for a writ of certiorari was filed on April 19, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding, sustained by the court below, that petitioner disciplined two employees in violation of Section 8(a)(1), (3), and (4) of the National Labor Relations Act because they engaged in protected concerted activities, including the invocation of Board processes for the redress of alleged unfair labor practices.

2. Whether it was an abuse of discretion for the Board to deny petitioner's motion to reopen the record in the unfair labor practice proceeding for the purpose of adducing a state court judgment that employee Sanders, found by the Board to have been discriminatorily dismissed by petitioner, was discharged for cause.

3. Whether the Board, in finding that petitioner violated the Act by discharging Sanders, could properly decline to give controlling weight to an award by a grievance committee, established under

a collective bargaining agreement, that Sanders was discharged for cause.[2]

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 19-21.

STATEMENT

I. The Board's Findings of Fact

Briefly, the Board found that petitioner, in violation of the Act, discharged one employee and disciplined another because they played a prominent role in a movement to bring about a change in the formula for determining seniority among the employees of petitioner. The subsidiary findings made by the Board may be summarized as follows:

Under a 1949 contract between petitioner, a motor freight carrier, and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, etc., Local 41, A.F.L., complete control over employee seniority matters was delegated to the Union (R. 1384, 1412-1413; 31-32, 107 NLRB 837, 839).[3] In November

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[2] As noted below, p. 17, since petitioner did not urge this contention before the Board, it is doubtful that this question is properly presented here on this record.

[3] In a separate unfair labor practice proceeding arising out of the filing of charges by four of petitioner's employees (*infra*, p. 5), the Board found, prior to its decision in this case, that the petitioner and the Union violated the Act by maintaining and enforcing contracts which delegated com-

1951, at the direction of the Union, petitioner changed its method of work assignment to certain drivers from a "rotation" to a "seniority" system. The "seniority" lists which the Union thereafter furnished and petitioner followed in making work assignments were based not upon the drivers' length of employment, but upon their length of membership in the Union (R. 1377, 1378, 1408; 32, 72-73, 468). The drivers affected, led by employees Sanders and Dunbar, sought a return to the former system and a change in the Union's definition of "seniority" (R. 1384; 81, 269-272, 466, 468-469, 470). Petitioner, claiming that the contract took "control" of the matter out of its hands, maintained a "hands off" policy and referred the men to the Union, from which they received no satisfaction (R. 1413-1414; 81, 82-84, 90, 269, 376, 466-467, 470, 471-473, 475).

A new contract, executed in January 1952, limited the Union's authority over seniority matters by a proviso that seniority determinations must be "without regard to whether the employees involved are members or not members of a Union" (R. 1412-1413; 621, 622, 623, Co. Ex. 10). Petitioner, however, continued assigning work from

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plete control over seniority to the Union. *Pacific Intermountain Express Co., et al.*, 107 NLRB 837, enforced in part, *National Labor Relations Board* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, etc., Local 41, A.F.L.*, 225 F. 2d 343 (C.A. 8). Certain facts established in that proceeding were judicially noted by the Board in its decision in the instant case (R. 1412, n. 7). Whenever such facts are mentioned, the record reference will be to the Board's decision published in 107 NLRB 837.

the Union's "seniority" list based upon length of membership in the Union (R. 1416, n. 12; 107 NLRB 837, 840, G. C. Ex. 27, Co. Ex. 13). The drivers' renewed efforts to secure a repeal of this work assignment method proved unavailing. When a petition posted by Sanders vanished from the drivers' bulletin board, he was told by his supervisor, Baker, that the Union steward said "this is union business" and the men cannot post petitions (R. 1415; 116-119, 120-121, 367-377, 475-476).[4] After a severe beating suffered at the hands of Union officer Clevenger, of which petitioner had knowledge, Sanders tried to enlist the intervention of petitioner's Director of Employee Relations Schaefer in the "seniority" dispute, but Schaefer told Sanders "That's between you and the Union" (R. 1384, 1415, 1417, n. 13, 1426; 128-129, 134-135, 141-143, 313, 354-355, 360).

In April, 1952, after Sanders visited the Board's regional office for information, four of the drivers, one of them Dunbar, filed charges with the Board (*supra*, p. 3, n. 3), alleging that the petitioner and the Union violated the Act by their discriminatory application of "seniority" based upon Union membership (R. 1416; 143-146, 107 NLRB at 856). About a week later, the day following a Union meeting at which the membership unanimously voted in favor of abandoning the Union's "senior-

[4] This was the second time that the Union had torn down a petition posted by Sanders. The first, of which Baker was also aware, had contained the signatures of almost 100 drivers who favored a return to the rotation system (R. 1414; 83-84, 376, 472-473, 475).

ity" system, supervisor Baker sought out Sanders. Baker confided to Sanders that, although he had formerly told him—when Sanders considered transferring upon leaving the hospital after the Union-inflicted beating—that there was no Union pressure to fire Sanders, "actually there has been a lot of pressure put on us," and "it would be best for everybody concerned" if Sanders transferred to another terminal. "The way they have these contracts written," Baker continued, "these people can do anything to us they want to." Referring to the high cost of recent strikes, Baker added that the Company "just can't stand that, we just can't have it." Sanders refused, explaining that since his opposition group appeared to be winning the fight there was no longer reason for Sanders to lose money and seniority in the terminal by transferring elsewhere (R. 1426-1428; 139-41, 146-150, 151-152, 301, 306-307, 313, 1329-1332).[5] Later, in August, supervisor Lohrey, a former Union steward, told Sanders, in the course of a discussion regarding seniority, that the Union did "a lot of things that are wrong . . . it's wrong for [the Union] to try to get you fired, too" (R. 160-161, 183, 901).

Late that month, after Sanders and Dunbar served petitioner with notice that they would hold it accountable under the contract for whatever damages they might suffer as a consequence of the

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[5] The rotation system was reinstated by the Company early in May; however, upon Union order, the Company reverted to the Union "seniority" method in July (R. 1384, 1417; 32, 155-156, 477).

change from the "rotation" to the Union "seniority" method of work assignment, supervisor Baker reproached Sanders for "putting the Company in the middle" by getting the men to file charges and "to sue," and predicted that "something will sure be done about this" (R. 1426; 164-165). In late September, Director of Labor Relations Schaefer interviewed Sanders and Dunbar after petitioner's receipt of a letter from Dunbar urging petitioner to "stand up" against the Union's "control" of the company. The "seniority" dispute, Schaefer told the men, was "a matter over which we had no jurisdiction" (R. 1417; 167-172, 544, 565-569, 570-571, 661-663, Co. Ex. 13).

A month later, on October 31, 1952, while on a regular run from Kansas City to St. Louis, Missouri, Sanders was intercepted at 1:30 in the morning by supervisor Lohrey and accused of speeding at 50 miles an hour in a 35-mile zone posted in the village of High Hill. Thereafter Sanders, who denied the charge (*infra*, p. 9, n. 9), was served with a "warning" letter, the most serious form of reprimand possible under the circumstances (R. 1385; 175, 177, 178-180, 808, G.C. Ex. 14).[6]

Meanwhile, the Board, after investigation of the charges filed by Dunbar and others (*supra*, p. 5), issued a complaint against petitioner and the Union on November 24, 1952, and hearings were held be-

[6] Under the contract, an employee could not be discharged for speeding unless petitioner had given him a "warning" letter for the same type of offense within the past nine months (R. 1385; 43-44). There was no such "warning" outstanding against Sanders at the time of this incident.

fore a Trial Examiner on December 15, 16 and 17 (R. 1385, 1418; 188). On December 18, in a state criminal proceeding, Union officer Clevenger was fined $100.00 upon a plea of guilty of assault upon Sanders (R. 1419, 1384; G.C. Exs. 10, 11). A $14,000 civil damage suit was also instituted by Sanders against Clevenger and the local Union president (R. 137).

During a recess on the last day of the Board hearing, January 12, 1953, Sanders became the target of threatening remarks by the Union's attorney in the presence of petitioner's attorney. In the course of a bitter verbal exchange with Sanders, who attended the hearing, the Union's attorney intimated that Sanders might not long remain in petitioner's employ and announced that if he had his way Sanders would be thrown out in the alley (R. 1420; 189, 191-192, 482-483, 1109, 1160, 1367-1368, 1369).

At 4:00 A. M. the following morning, Sanders and Dunbar, who had left Kansas City in separate vehicles the previous night with cargo bound for petitioner's St. Louis terminal, were trailed into that terminal by supervisors Baker and Lohrey. Baker summarily discharged Sanders, charging him with exceeding speed limits in three small communities that night. Dunbar, who was also charged with speeding, was told that since, unlike Sanders, he had no previous "warning," he could not be discharged but would receive a "warning" letter. On the following day, Sanders was formally notified of his discharge and Dunbar given a "warning" let-

ter (R. 421, 1385-1386; 199-203, 500, 501-502, 505, 576-577, 868, G.C. Exs. 18, 28). Both men maintained their innocence and Sanders later turned over to petitioner the tachograph recordings[7] of his truck speeds on the night of January 12 as well as the night of October 31 (*supra*, p. 7) to corroborate their claims (R. 205, 336-337, 380, Co. Ex. 8).[8] Petitioner, however, did not even check the tachographs (R. 707) despite the fact that offenses such as those charged to Sanders and Dunbar were normally dealt with leniently at their terminal, the supervisors making every effort in other cases to determine whether "there was a possibility that they weren't violating" (R. 892, 888, 893-894, 895). Also, because of the Union's belligerent defense of employees charged with misconduct in the past, petitioner, as a rule, was reluctant to discharge unless it had sufficient proof to make such discharge "stick" (R. 717, 725).

Sanders, invoking the grievance procedures of the contract, filed a formal appeal from the discharge through the Union (R. 1421, 1388; Co. Exs. 3, 4, U. Ex. 1).[9] Clevenger, who had but recently

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[7] A tachograph is a clock-synchronized tachometer, operated on the principle of a speedometer, which mechanically marks on a paper chart the time elapsed, distance traveled, and speed of a vehicle at any given time (R. 1392, 1422; 181).

[8] Dunbar's tachograph recorder was out of order the night of January 12; however, he had closely followed Sanders throughout the journey (R. 1423, 1391, 1400; 196, 197, 486, 499-500, 504, 564, 572, 820).

[9] This automatically became an appeal also from the "warning" letter previously given to Sanders (*supra*, p. 7), since protest against the issuance of such "warning" could be made only when the employer tried to use the letter as a basis for discharge (R. 1190-1191, 1200, 1210-1211).

been fined for assaulting Sanders, was assigned to represent him. Overriding Sanders' protests against the omission of the first step in the grievance procedure,[10] and his objection to Clevenger's representing him, the Union set the case for final hearing and sent Clevenger to argue the case. Disregarding Sanders' offer of the tachograph charts and witnesses to prove that he was not speeding, either on the occasion of the "warning" letter or his discharge, the Union submitted no evidence, called no witnesses, and, conceding all the facts, argued merely that the penalty of discharge was too severe. Sanders' dismissal was upheld by the grievance committee (R. 1421, 1386, 1388-1389; 420, 422-423, 429, 451, 452-453, 632-635, 641, 646-648, 684, 711, 712, 723, 730-733, 1171-1172, 1217, 1264-1265, 1334-1335, 1339-1341, 1343, U. Ex. 1, Co. Ex. 22).

II. The Board's Conclusions and Order

Upon the facts summarized above and the entire record, the Board credited Sanders' and Dunbar's denial of excessive speeding as charged by petitioner and rejected petitioner's assertion that the two employees were disciplined for that reason.[11]

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[10] A meeting between petitioner's representatives and Clevenger and Sanders, required by the grievance procedure as the first step in processing grievances, was called off without dissent from Clevenger because petitioner's representative objected to Sanders' appearing with an attorney and stenographic reporter (R. 388; 390-391, 397, 706-707, 1242-1245, 1252-1253, 1353).

[11] Although the trial examiner discredited in part Sanders' testimony and for that reason recommended dismissal of the complaint for failure of proof, he, like the Board, concluded

The Board found, instead, that petitioner took such action against the two employees because it disapproved of their efforts to bring about a change in the Union's "seniority" formula, including their invocation of Board processes. Accordingly, the Board held that petitioner discharged Sanders and disciplined Dunbar, in violation of Section 8(a)(1), (3) and (4), because of their participation in such protected concerted activities including the invocation of Board processes, thereby encouraging membership in the Union and loyalty to the Union's policies and discouraging the invocation of Board processes.[12]

In its order, the Board directed petitioner to cease and desist from the unfair labor practices found, to reinstate Sanders to the position he would have had but for the discrimination committed against him, to make Sanders whole (jointly and severally with the Union) for whatever loss of earnings he suffered because of petitioner's discharge action, and to remove from its official

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that the charge of excessive speeding levelled against the two employees was false (R. 1422-1423). In thus resolving the conflicting testimony, both the examiner and the Board found, *inter alia*, that the tachograph readings tended to corroborate Sanders' testimony so as to warrant resolving in his favor all doubts as to the truth of his testimony regarding the alleged speeding episode (*ibid.*).

[12] The Board also found that the Union violated Section 8(b)(2) and 8(b)(1)(A) of the Act, by causing or attempting to cause the Company to discharge Sanders and discipline Dunbar because of their concerted activities in opposition to the Union's "seniority" system, and directed the Union to take appropriate remedial action (R. 1425). The affirmance by the court below of this finding and order is not here in issue.

personnel records the warning letter it issued to Dunbar (R. 1429-1434).

Following issuance of the Board's Decision and Order, petitioner filed its motion with the Board to reopen the record for the purpose of receiving (1) the record of the proceedings before the Industrial Commission of Missouri and its Appeals Tribunal, with reference to Sanders' claim for unemployment insurance benefits, and (2) the decision and judgment of the Circuit Court of Jackson County, Missouri, affirming the State Industrial Commission's denial to Sanders of unemployment insurance benefits on the ground that he was discharged for excessive speeding (R. 1442-1449). The Board denied the motion for the reasons, *inter alia*, that the judgment of the state tribunal was not binding upon it and that, in any event, the proffered evidence would not detract from the evidence upon which the Board relied in making its finding of fact on the speeding issue and would not require a different disposition by the Board of the case (R. 1450-1451).

III. The Decision of the Court Below

The court below concluded that there was "substantial evidence when viewed in the light of the record in its entirety to support the findings and decision of the Board" (Pet. A2-A14). Rejecting petitioner's contention that the Board abused its discretion in failing to grant petitioner's motion to reopen the record (*supra*), the court stated, "Each fact-finding agency is entitled to

make its own decision upon the evidence before it, and the fact that another tribunal has reached a different conclusion upon the same issue arising out of the same transaction does not invalidate any decision which has proper evidentiary support" (Pet. A14).

Accordingly, the court enforced the Board's order (Pet. A14, 17-21).

ARGUMENT

1. The principal thrust of petitioner's case here, as encompassed in questions Nos. 1, 4 and 5, is that (Pet. pp. 2-3, 8-9, 11-14) the record as a whole fails to suport the Board's findings and that the court below, in approving them, ignored the controlling test of judicial review enunciated by this Court in *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474. The petition in this respect presents no issue warranting review by this Court. The decision of the court below demonstrates on its face that the court, in keeping with the *Universal Camera* rule, carefully assessed "the reasonableness and fairness" of the Board's findings in the light of the entire record and properly concluded that they were adequately supported. For the most part, petitioner's quarrel with that judgment merely raises a question as to the sufficiency of the supporting evidence, including the credibility of certain witnesses. These are matters which this Court does not normally undertake to review. *National Labor Relations Board* v. *Pittsburgh Steamship*

Company, 340 U.S. 498, 502-503; *Universal Camera Corporation*, 340 U. S. at p. 491.

In particular, petitioner (Pet. 8-9) challenges the Board's finding "that the Company's indifference to its employees' legitimate complaints, its reference of the same to the Union for ultimate disposition, and its ratification of the Union's treatment of same, evidences a company hostility toward the dissidents' activities and a predilection to act, with respect to such employees, in harmony with the Union's suggestions or desires" (R. 1418). According to petitioner, no such inference can justifiably be drawn since its action was pursuant to a contract provision delegating authority to the Union to make "seniority" determinations and since such provisions were then deemed permissible by the Board. This contention, however, ignores another contract provision emphasized by the Board. In the 1952 contract, as the Board noted (R. 1413), petitioner "expressly qualified the Union's power by a provision requiring it to make 'seniority' determinations without regard to the employees' membership or non-membership in the Union, and thus ostensibly reserved a right to deal with employee complaints over the very kind of Union 'seniority' determinations about which the dissident employees group was here concerned" (*supra*, p. 4). It was petitioner's failure, in the face of this limitation, "to take any action to investigate or resolve the legitimate complaints of its employees against the discriminatory effect of the 'seniority' determinations on their job interests,"

which the Board considered, together with other factors, to be indicative of petitioner's hostility to the concerted activities of the employees in question (R. 1413).

2. Equally insubstantial for purposes of certiorari is the further claim (Pet. 10) that the court below erred in upholding the Board's denial of petitioner's motion to reopen the record for the purpose of incorporating therein the judgment of the Circuit Court of Jackson County, Missouri, which disqualified Sanders for benefits under the Missouri Employment Security Law on the ground that Sanders was discharged for speeding.[13] As the court below stated, "Each fact-finding agency is entitled to make its own decision upon the evidence before it, and the fact that another tribunal has reached a different conclusion upon the same issue arising out of the same transaction does not invalidate any decision which has proper evidentiary support" (Pet. A14). The state decision here, predicated upon a wholly different record[14]

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[13] Petitioner's statement that the "record in the State proceedings was made a part of the Board record" (Pet. 10) is incorrect.

[14] In denying petitioner's motion to reopen, the Board noted that "the evidence adduced in the two proceedings was not identical, and could not have been identical, in view of the difference in the scope of the two proceedings . . . (1) the tachograph charts adduced in evidence at the Board hearing were not provided at the State proceedings; (2) the Union was not a party to the State proceedings; (3) the witnesses in the two proceedings were not the same; and (4) the cross-examination of some of the witnesses who testified in both proceedings was not by the same attorneys" (R. 1451).

and one in which the Board did not participate in any capacity, could neither bind the Board nor, in view of the differences in the two proceedings, detract from the substantiality of the evidence supporting its findings.[15] *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 460; *United States* v. *Southern Pacific Co.*, 259 U.S. 214, 240; *National Labor Relations Board* v. *Deena Artware, Inc.*, 198 F. 2d 645, 653 (C.A. 6), certiorari denied, 345 U.S. 906; *United Brick and Clay Workers* v. *Deena Artware, Inc.*, 198 F. 2d 637, 642-643 (C.A. 6), certiorari denied, 344 U.S. 897). In these cir-

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[15] The cases petitioner cites (Pet. 10) are not to the contrary. In *National Labor Relations Board* v. *Injection Molding Co.*, 211 F. 2d 59 (C.A. 8), the court (at p. 65) merely alluded to a state unemployment compensation decision which was not part of the record in the Board proceedings. In *Daily Review Corp.* v. *National Labor Relations Board*, 192 F. 2d 269 (C.A. 2), it was material to a determination of a question before the Board to know what position the parties had taken concerning a contract at a State Mediation Board meeting (87 NLRB 1265, n. 6, 1270, n. 5). The court held that a witness should have been required to answer, in the Board proceeding, relevant question concerning the parties' discussions at that meeting (192 F. 2d at 270).

Nor was the Board's refusal to reopen here inconsistent with its action in *Nashville Corporation*, 94 NLRB 1567, 1568, where the transcript of a state court proceeding, offered in support of an employer's claim that it was free to discharge strikers who had been found guilty of violating a state court injunction against picketing, was admitted in evidence (*ibid.*, p. 1579). While holding such evidence to be admissible in the context of that case, the Board made clear that it did "not thereby hold that either the judgment or the findings of fact on which the judgment is based are binding upon it," and that "a finding that a State court injunction has been violated is not dispositive of whether an employer is obliged to reinstate such strikers" (*ibid.*, pp. 1568, 1569-1570).

cumstances, the Board did not exceed the permissible limits of its discretion in denying petitioner's motion.

3. Petitioner's further claim (Pet. 11) that the Board erroneously disregarded the ruling of the grievance committee, which held the dismissal to be for cause, likewise presents no question for review by this Court. Presumably petitioner's complaint is that the Board should have given controlling weight to that determination in reaching its conclusion in the unfair labor practice proceeding. It is doubtful whether this question is properly before the Court since no such contention was made before the Board. Section 10(e) of the Act; *National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 350. In any event, the contention is without merit. While the Board is not bound by such an award,[16] it has respected comparable awards where the proceedings leading to such an award "appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082. Here, however, the circumstances surrounding the award of the grievance committee,

[16] Section 10(a) of the Act; *National Labor Relations Board v. UAW, Local 291*, 194 F. 2d 698 (C.A. 7); *National Labor Relations Board v. Walt Disney Productions*, 146 F. 2d 44, 48 (C.A. 9), certiorari denied, 324 U.S. 877; *National Labor Relations Board v. Bell Aircraft Corporation*, 206 F. 2d 235, 237 (C.A. 2). There are no contrary decisions.

set forth above, pp. 9-10, clearly did not entitle the award to such respect by the Board.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such or-

der was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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